IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 619 of 1990

with

CRIMINAL APPEAL No 1017 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

KANTIBHAI P TADVI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 619 of 1990
MR PUSHPADUTTA VYAS FOR MR BS PATEL for Appellants
MR K.G.SHETH, APP for the State

2. Criminal AppealNo 1017 of 1990
MR PUSHPADUTTA VYAS FOR MR BS PATEL for Appellants
PUBLIC PROSECUTOR for the State

CORAM : MR.JUSTICE R.K.ABICHANDANI
and
MR.JUSTICE SHARAD D.DAVE

Date of decision: 27/06/2001

ORAL COMMON JUDGEMENT

(Per : MR.JUSTICE R.K.ABICHANDANI for the Court)

1. These two appeals have been preferred by these four appellants, one through their lawyer and the other through jail, against the judgement and order dated 31st July 1990 of the learned Additional Sessions Judge, Vadodara in Sessions Case No.12 of 1990, by which all the appellants - original accused persons were convicted for the offence under section 302 read with section 34 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for life.

2. The prosecution version was that, on 29th October 1989, at about 3.00 p.m., the accused No.1 - Kantibhai Panchabhai Tadvi armed with an axe, the accused No.2 Kanubhai Chhaganbhai Tadvi armed with a stick, the accused No.3 - Rameshbhai Ramabhai Tadvi armed with a crowbar and the accused No.4 - Bhagabhai Chhaganbhai Tadvi armed with a stick, came near the house of Somabhai Panchabhai, who was the brother of the accused No.1 Kantibhai Tadvi and also closely related to the other accused persons and attacked Somabhai with these lethal weapons, causing his death. According to the prosecution, this incident had occurred after there was, in the morning, an altercation between Somabhai and Kantibhai in presence of a witch-doctor. Somabhai had asked Kantibhai to identify the Goddess or God after whom the `lemon' was named. After the quarrel, Somabhai had gone to his house and had his meals and while he was near his compound (vada), all these accused attacked him causing him serious injuries, which resulted in his death on the spot. According to the prosecution version, the wife and daughter of Somabhai had seen these accused persons attacking him and causing his death. A neighbour Somsinh Ramsinh, PW-5 is also said to have seen the incident. The F.I.R. at exh.12 was given by Santokben widow of deceased Somabhai in which the names of all the four accused persons were disclosed and the aforesaid incident was narrated.

3. The Charge was framed by the learned trial Judge at exh.3, alleging that all these accused persons had acted in a concerted manner, and, in furtherance of their common intention to cause death of Somabhai, they

attacked him with the lethal weapons. In the process, the accused No.1 gave axe blows, the accused No.2 gave stick blows, accused No.3 hit gave blows with a crowbar and the accused No.4 also gave stick blows on various parts of the body of Somabhai as detailed in the charge, which resulted in his death and all of them thereby, committed offence under section 302 read with section 34 of the Indian Penal Code.

4. The trial Court relied upon the depositions of the eye-witnesses Santokben, widow of deceased Somabhai, PW-1, at exh.11, Sunderben, daughter of Somabhai, PW-2, at exh.12 and Somsinh Ramsinh, PW-5, a neighbour, at exh.21, and held that their version was corroborated by the medical evidence and the panchnama, and further that it was established from the totality of the evidence that these accused persons had a motive to attack Somabhai, because of the previous quarrel between Somabhai and the accused No.1 - Kantibhai, who were brothers, due to a dispute that had taken place between them over the accused No.1 being asked by Somabhai to identify the God or Goddess after whom the `lemon' was named, in presence of a witch-doctor. It appears that there is a superstitious belief amongst some people as per which a `lemon' brought by a person wanting to ward off evil is named after a God or Goddess such as "Bhathuji Maharaj" or "Kalka Maata" by the witch-doctor who would secretly put the mark denoting the particular God or Goddess on the `lemon'. Thereafter, the `lemon' is placed for identifying the name of the God or Goddess which the `lemon' bears. There is a superstitious belief that if the person who is asked to name the God or Goddess turns out to be wrong on verifying the `lemon', ill luck will befall him due to the wroth of the God or Goddess whom he could not identify. This process is used by the witch-doctors for purporting to ward off the evil by subsequently keeping such `lemon' at cross-roads. The `Kali Chaudas' night precedes the Diwali day and the process of naming the `lemon' after Goddess / God is done by the witch-doctor at night, before the `lemon' is put up for indentifying the name of the God or Goddess. The person with superstitious belief that ill luck will befall if there is mistake in identifying would get terrified if he is asked to name the God & Goddess and this can lead to resentment against the person at whose behest he is asked to identify the `lemon'. This is what we have gathered during the court proceedings and from the depositions of witnesses Jaswantsinh exh.14, Sunderben exh.13, Santokben exh.11 and Somsinh exh.21. It is a pity that such superstitious beliefs are still prevalent and exploited by witch-doctors for their vested

interests, in modern times despite the fundamental duty of every citizen under Article 51-A (h) of the Constitution to develop scientific temper and the spirit of inquiry and reform.

5. Santokben, PW-1, in her deposition at exh.11, has stated that the accused No.1 Kanti Pancha was a younger brother of her husband. She has stated that the incident had taken place on the Diwali Day in the afternoon around 2 o'clock. She knew the other accused persons also, because, the accused No.2 was a cousin of her husband, the accused No.3 was her nephew and the accused No.4 was her cousin. She has stated that there was a quarrel between her husband and the accused No.1 - Kanti Pancha. Thereafter, her husband had come to the house and had his meals. After having his meals, he had gone in their compound adjoining the house. At that place, there was an altercation between the accused No.1 and her husband. At that time, the other three accused, whom she has named, were also present. The accused No.1 - Kanti Pancha was having an axe, the accused No.3 - Ramesh Rama had a crowbar, the accused No.2 - Kanu Chhagan had a stick and the accused No.4 - Bhaga Chhagan also had a stick. When the altercation started, she was having her meals, but on hearing the noise, she and her daughter Sunderben ran out of the house and went in the compound. She saw the accused No.1 - Kanti Pancha giving two axe blows on the head of her husband, causing injuries on his head. She also saw the accused No.3 - Ramesh Rama beating her husband with a crowbar and the accused No.2 Kanu Chhagan and the accused No.4 - Bhaga Chhagan hitting him with several stick blows. She has identified the weapons which were used by these accused persons. Her version is fully corroborated by the F.I.R. at exh.12, which she had lodged. In her cross examination, nothing is brought out which would create any doubt against her version about the incident.

6. The learned counsel for the appellants - accused contended that Santokben was taking her meals at the time when she heard the altercation between the accused No.1 and her husband and therefore, she could not have witnessed the incident. He submitted that she had stated that she and her daughter had come out of the house while they were having meals and therefore, it was likely that, by the time they came out, the assailants had gone away. He also submitted that, on the aspect of motive, Santokben had stated that the previous incident over naming the `lemon' in which the deceased and the accused No.1 had quarrelled, had taken place on the previous night, while as per the other evidence on record, that

incident is said to have taken place on the Diwali day in the morning. It will be seen from the deposition of this witness that she is an illiterate woman, who was doing labour work. She has stated that there was a quarrel between her husband and the accused No.1 before a witch-doctor over identifying the `lemon'. In the F.I.R. exh.12, she had stated that this incident had taken place in the morning at 10 o'clock near a place known as `Bhathiji's Deri'. Such gathering takes place when vows (`Baadha') are taken. Her daughter Sunderben had also gone there. She had returned at 12 o'clock noon and told her that there was a quarrel between Somabhai and the accused No.1 over identifying the `lemon' before the witch-doctor. She told her that he was following her and soon thereafter, Somabhai followed and he also told her about the quarrel. Thereafter, Somabhai after having meals, went outside the house at about 3 o'clock, and while he was outside the house, when she and her daughter were having meals, she heard the accused No.1 Kanti abusing her husband. She and her daughter then came out of the house and saw that these accused persons chased her husband, attacked him with these weapons, as a result of which he fell down. In the complaint, it was stated that the accused No.1 - Kanti Pancha gave axe blows on the head of her husband and others had given blows with crowbar and sticks, and her husband started bleeding and died due to attack. She, therefore, started crying and after sometime, went to the police patel Jashwantsinh Narsinh and told him about the attack. It was stated in the FIR that she and her daughter Sunderben had seen the incident. It will, thus, be seen that, on all material particulars, her version before the Court stands fully corroborated by her earliest version given in the F.I.R. at exh.12. Therefore, a slight discrepancy in the deposition of this illiterate witness that the quarrel over naming the `lemon' before a witch-doctor had taken place on the previous night, is hardly of any consequence. She was closely related to all the accused persons and had no earthly reason to falsely implicate them if the offence was committed by any other person. The suggestion on behalf of the accused persons that some unknown people may have killed Somabhai is baseless, because, in that event, all these four accused persons who were closely related to the deceased, would not have gone away to village Sankheda and other places and they would have come to help this widow in the moments of her grief. It does appear from her deposition that there was some quarrel between Somabhai and his brother Kanti in the morning over the superstitious practice of naming a `lemon' in presence of a witch-doctor. Thereafter, Somabhai had gone to his house, while the other four

accused collected weapons and came to the house of Somabhai and while he was outside his house, attacked him with these weapons causing multiple injuries to him, which resulted in his death.

7. The other eye-witness Sunderben, daughter of the deceased Somabhai, in her deposition at exh.13, has stated that, in the morning of the incident which took place on the Diwali day, she and her father had gone to attend the `Ravna' where two witch-doctors were present and three `lemons' were displayed. Her uncle i.e. accused No.1 was wanting the `lemon' to be identified as to which `lemon' was of `Bhathuji Maharaj' and which was of `Kalika Mata'. Thereupon, her father had asked the accused No.1 to identify it and the accused No.1 flared up and tried to beat her father who also picked up a stone. Thereafter, she came back to the house and told her mother about the incident. Her mother asked her as to why did she not bring her father back and she said that he was following her. Thereafter, her father came and had his meals. After having his meals, he went out of the house. At that time, these four accused persons were standing in the field. They chased her father and the accused No.1 Kanti gave him axe blows on his head, the accused No.3 Ramesh Rama gave a blow to her father on his chest with a crowbar. Her father had raised cries and therefore, she and her mother had come out of the house. She has stated that the accused No.2 - Kanubhai Chhaganbhai and accused No.4 Bhagabhai Chhaganbhai were having the muddamal sticks, which were shown to her, while the accused No.1 was having the muddamal axe and the accused No.3 was having the muddamal crowbar, which were shown to her. She had witnessed the incident from a distance of about ten steps. On all the material particulars of the incident, she fully supports the prosecution and nothing is brought out in her cross-examination which can create any doubt against her testimony. Her deposition also clearly establishes that these four accused persons had come together, armed with these weapons and after her father had gone out of the house after having his meals, they attacked him, causing multiple injuries to him, which resulted in his death.

8. It was submitted by the learned counsel for the appellants that there was inconsistency between the deposition of Sunderben and the deposition of her mother about the time of previous incident of the quarrel over identifying the name of God or Goddess, after whom the `lemon' was named, in the presence of a witch-doctor. As noted above, even in the F.I.R. exh.12, it was clearly mentioned that the incident had taken place in the

morning. Santokben has committed an obvious mistake when she states that it had taken place on the previous night, because, all other evidence shows that the quarrel had taken place in the morning. The deposition of this witness cannot be discarded on such minor discrepancy in the deposition of her mother. Her version is to be tested on her own and it clearly transpires from her version that the incident did take place in the manner alleged by the prosecution and these four accused had attacked her father with weapons and killed him near his house in the open space. It also becomes clear from the deposition of Santokben and Sunderben that Somabhai was unarmed when he was attacked. He had just finished his meals and gone in the compound to ease himself as stated by Santokben, and at such a time when he was totally unarmed and had not displayed any hostility towards any of the accused persons, they had attacked him with all these weapons after having earlier assembled and come together for the purpose of assaulting Somabhai. The manner in which they came together with the weapons and waited outside the house of Somabhai and attacked him soon after he came out and caused multiple injuries with these weapons, is clearly indicative of the common intention with which the accused persons were acting. From the manner of assault, it is obvious that the death of Somabhai was caused in furtherance of the common intention of all the accused persons. The concerted effort of attacking an unarmed person after waiting for him outside his house, speaks eloquently about the prior meeting of minds of these four accused persons who were all related with each other.

9. The version of Somsinh Ramsinh, PW-5, at exh.21 also clearly points to the part played by these four accused persons in the commission of the crime. He was a neighbour who, on hearing the shouts, had seen the incident from about 10 to 15 steps away. At the time when he gave deposition, when asked to identify the accused persons, he had to go nearer the accused persons and had identified them, because, according to him, from a longer distance, he was not able to see. However, he was staying nearer the place of incident and when he says that he has seen the incident from a few steps away, there is no reason to disbelieve him, especially when the time and manner of attack as to which he deposes tallies with the direct evidence of the other two eye-witnesses who had absolutely no reason to falsely implicate any of these accused persons. He has stated that, in the morning of the day of the incident, he was present at `Ravana' function at the temple of "Bhathuji" and Soma Pancha had at that time asked the accused No.1 Kanti

Pancha to identify as to of which Goddess the `lemon' was. Both the brothers thereupon started fighting and were separated by this witness and others. Thereafter, they all dispersed after taking `prasad'. Even police patel Jaswantsinh exh.14, who was present at that time has deposed about the said quarrel between these two brothers.

10. The learned counsel for the appellants argued that Santokben and Sunderben had stated that the complaint was given at the behest of the police patel Jashwantsinh Narsinh. A police patel is an important person in a village. This police patel was known to the complainant and it was but natural for her to turn to the police patel after she found that the accused No.1 who was her own brother in-law and cousins had attacked her husband and killed him. The police patel had sent a `vardi' to the police and soon thereafter, the investigating officer had come to the village and recorded in his presence the F.I.R. exh.12. The complainant Santokben has clearly denied the suggestion of false implication of the accused persons. She had given the names of all the four persons to the police patel Jaswantsinh, as stated by him in his deposition at exh.14. The fact that she had given the names afterwards and not initially hardly matters, because, all these names clearly appeared in the F.I.R. at exh.12, which was recorded on that day itself. Jashwantsinh Narsinh has, in his deposition, stated in paragraph 3 that the F.I.R. exh.12 was given by Santokben to the P.S.I. in his presence. If, in the process, the police patel has advised the complainant to give out the names of all accused persons, it cannot be said that those accused persons were being framed. The accused persons were closely related to the complainant who was an illiterate woman and had to be encouraged to give out the names of the real culprits. Such a process cannot be said to be an interference with the version which was given by the complainant. An advice to the complainant to give the real names of the accused persons was a proper thing to be done by the police patel. It is obvious that there was absolutely no scope for falsely implicating any of the four accused persons by the complainant as they were so very closely related to her husband, deceased Somabhai. In normal course of conduct, there was no scope of the complainant trying to shield any stranger and implicate her own kith and kin. We are fully satisfied that these four accused persons had attacked Somabhai with the weapons and caused his death, as narrated by the complainant, both in her complaint as well as in her deposition, and as also narrated by

Sunderben, the daughter of the deceased Somabhai. Insignificant and minor discrepancies cannot be used as a lever for discarding the direct and important evidence which clearly points at the guilt of the accused. As observed by the Supreme Court in Boya Ganganna v. State of Andhra Pradesh, reported in AIR 1976 SC 1541, minor contradictions are bound to appear when ignorant and illiterate women are giving evidence, and that the evidence given by a witness would depend upon his power of observation and it is possible that some aspects of an incident may be observed by one witness, while they may not be witnessed by another though both are present at the scene of offence. It was held that it would not, therefore, be right to reject the testimony of such witnesses merely on the basis of minor contradictions.

10.1 The contention that Santokben and Sunderben were having their meals and therefore, could not have witnessed the incident, ignores the normal human reaction which would be of immediately rushing out when familiar voices of close relatives are heard in an atmosphere of hostility of an attack on their own person. It would be too naive to suggest that both the mother and daughter would keep on having their meals when they heard their close relatives shouting at Somabhai, who had just gone outside the house. Both of them have said that they immediately rushed out and had seen the incident and that obviously was their natural reaction due to their concern about the well-being of Somabhai. The fact that the dead body of Somabhai was found very near from the house, is clearly established. Measurements of a few feet here and there on the basis of which an argument was tried to be woven on the distance aspect, is hardly of any consequence when both these witnesses have said that they had witnessed the incident from close quarters.

11. The learned counsel appearing for the appellants submits that, in any event, since three axe wounds were caused by the accused No.1 on the head of Somabhai as per the medical evidence and these were very serious injuries, the other accused persons could not be attributed with the common intention of causing death of Somabhai. The learned counsel placed reliance on the decision of the Supreme Court in Dharam Pal v. State of Haryana, reported in AIR 1978 SC 1492 in support of his contention. It was held by the Supreme court in that decision that, a criminal court fastening vicarious liability must satisfy itself as to the prior meeting of the minds of the principal culprit and his companions who are sought to be constructively made liable in respect of

every act committed by the former. It was held that there is no law which lays down that a person accompanying the principal culprit shares his intention in respect of every act which the latter might eventually commit. It was held that the existence or otherwise of the common intention depends upon the facts and circumstances of each case. The learned counsel also relied upon the decision of this Court in Dhansukh Chhotalal Joshi v. State of Gujarat, reported in 31(1) GLR 396 in which it was held that, in order to attract section 34 of the Indian Penal Code, it is not sufficient to prove that each of the participating culprit had intention to commit a certain act. The requisite ingredient of section 34 is that each must share the intention of the other. There cannot be any dispute about this proposition. In the present case, as held above, the manner in which these four accused persons came together, armed with lethal weapons and the way in which they attacked Somabhai when he came out of his house, and gave multiple blows to him, resulting in serious injuries as a result of which he fell down profusely bleeding and also the manner in which they had all ran away from the place after attacking Somabhai, are all clearly indicative of the fact that there was a prior meeting of minds of all the four accused to cause the death of Somabhai. There was sufficient motive so far as the accused No.1 is concerned, because of the earlier quarrel with Somabhai over "identifying" the `lemon' and the other three accused who were closely related with the accused No.1, would never have joined the assault unless they had shared his intention. The concerted manner in which they have acted in attacking Somabhai and then decamping from there, shows that they had all participated in the crime after there was a prior meeting of minds between them to finish off Somabhai who was unarmed at the time when they attacked him. In fact, they waited for him to come out of the house and then, having accomplished their task, they went away.

12. We are, therefore, in full agreement with the reasoning and findings of the learned trial Judge in the impugned judgement and order. Both the appeals are, therefore, dismissed.

JUNE 27, 2001 [R.K.ABICHANDANI, J.]

[SHARAD D. DAVE, J.]

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